In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, *v.* SUDA REYNOLDS. } Petitioner, No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above entitled cause.

QUESTION PRESENTED.

The case presents the question whether the twenty-five-year trust period provided for in the General Allotment Act of February 8, 1887 (24 Stat. 389)*,

* The pertinent provisions of the act of 1887 are as follows:

SEC. 3. That the allotment provided for in this act shall be made by special agents appointed by the President for such purpose and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of

begins to run from the date of the issuance of the so-called trust patent or from the date of the approval of the allotment by the Secretary of the Interior.

THE FACTS.

This suit was brought against the defendant Suda Reynolds, as the grantee of one Stella Washington, an Absentee Shawnee allottee, under the act of February 8, 1887, as amended by the act of March 3, 1891 (26 Stat. 1019), to cancel a deed executed by one of the 11 heirs of the allottee for his one-eleventh interest in 40 acres of land in Pottawatomie County, Okla. The facts are undisputed, and it is alleged in the bill of complaint, and admitted in the answer, that the schedule of allotments, including this allotment, dated August 7, 1891, was approved by the Secretary of the Interior September 6, 1891, and deposited in the General Land Office February 6, 1892, on which date a trust patent was issued to the allottee. A certified copy of this trust patent is attached hereto as Appendix A. The allottee died in

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the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act.

1911. On November 24, 1916, the President issued an order extending for a period of 10 years the trust periods on the allotments to Absentee Shawnee Indians in Oklahoma expiring during the calendar year 1917, with certain enumerated exceptions. The allotment in question does not appear among the exceptions. On February 17, 1917, Claudius Tyner, one of the heirs of the deceased allottee, executed a warranty deed purporting to convey his interest in this land to the defendant.

It was contended by the plaintiff that the trust period began on February 6, 1892, the date of the trust patent, and expired 25 years thereafter, to wit, February 6, 1917, and that therefore the allotment came within the terms of the Executive Order of November 24, 1916, which extended the trust period for 10 years, and consequently the deed to the defendant was void.

It was contended by the defendant that the trust period began on September 6, 1891, the date of the approval of the allotment, and expired 25 years thereafter, to wit, September 6, 1916, and that the allotment was therefore not within the terms of the Executive Order and was free from restrictions on February 17, 1917, when the deed in question was executed.

The District Court held with the contention of the Government and decreed the cancelllation of the deed, but the Circuit Court of Appeals reversed the decision of the District Court and remanded the cause with directions to dismiss the bill of complaint.

The value of the one-eleventh interest in the 40 acres of land directly in issue is less than $1,000 and insufficient to allow the case to be brought to this court by appeal.

REASONS FOR ALLOWANCE OF WRIT.

The decision of the Circuit Court of Appeals reversing the judgment of the District Court was by a divided court and there are other cases pending in the District Court involving this question.

The Assistant Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated July 3, 1918, says:

> Attached to this communication is a list of Indian Tribes where the executive order extending the trust period on allotments was made more than twenty-five years from the date of the approval of the schedule of allotments but within twenty-five years of the issuance of the trust patents. Approximately 4,800 allotments to members of the thirteen tribes listed are affected by the opinion of the Circuit Court of Appeals. All these Indians have been found by the department to be incapable of managing their own affairs, and unless the opinion is reversed by the Supreme Court there is little doubt that a great proportion of these incompetents will lose part, possibly nearly all, of their property, and the Government will not have the power to aid them.
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> Not only the allotments on which the extensions have been made will be affected, but others where the schedules were approved

more than twenty-five years ago, and the trust patents issued less than twenty-five years ago. In some cases, for various reasons, several years elapsed between the date of approval of the schedules and the issuance of the patents, and under this opinion the lands would be taxable long before the Government considers them liable for taxes.

The case is, therefore, of general and public importance.

BRIEF IN SUPPORT OF THE PETITION.

I.

The decision of the Circuit Court of Appeals reverses the contemporaneous interpretation put upon the act of 1887 by the executive department in issuing trust patents thereunder and since uniformly adhered to.

The trust patents issued under this act declared the trust contemporaneously with the instruments creating them, and thus the executive department contemporaneously interpreted the statute to mean that the trust period should begin with the date of the patent. In 38 L. D. 559, 561, this interpretation of the Interior Department is adhered to in the opinion of the First Assistant Secretary when, in considering allotments under this act to the Klamath Indians, he said:

> The language of section 5 of the act of 1887 is "that upon the approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and

declare that the United States does and will hold the land thus allotted," etc. Here clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, "does," shows that the trust period begins to run only upon such issuance. The form of patent both under the acts of 1887 and 1906 reads: "and hereby declares that it does and will hold the land thus allotted," etc. This same idea is further expressed in section 6 of the act of 1887, according citizenship to the allottee, which citizenship is not accorded until after issuance of patent, as shown by the following language: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been *made* shall have the benefit of and be subject to the laws * * * and every Indian born within the territorial limits of the United States to whom allotments shall *have been made* under the provisions of this act * * * is hereby declared to be a citizen of the United States." Under the act of 1906 the allottee is accorded citizenship only upon the expiration of the trust period and issuance of patent in fee at any time the Secretary of the Interior may be satisfied of the competency of the allottee. Provision is also made in said act, as well as in the act of May 29, 1908, for issuance of patents in fee to the heirs of deceased allottees or their lands may be sold and patent issued to the purchasers. It thus follows that by ruling that an allotment is *made* only upon issuance of trust patent, and that the trust

> period begins to run only from that date, the allottee or his heirs may, nevertheless, curtail that period by securing patent in fee.

This construction by executive officers of the Government charged with the administration of Indian affairs, and all matters of public and Indian lands, is entitled to great weight. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Holliday*, 3 Wall. 407; *Geofroy* v. *Riggs*, 133 U. S. 258, and is "determinately persuasive," *United States* v. *Hammers*, 221 U. S. 220, 229.

The very least that can be said is that the language of the act is fairly susceptible to the interpretation put upon it by the Interior Department and should not be overthrown, for in *Schell's Executors* v. *Fauche*, 138 U. S. 562, 572, the court, speaking through Mr. Justice Brown, said:

> In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.

II.

The uniform interpretation by the Interior Department is clearly right.

The provision of the act requiring the Secretary to cause to be issued patents declaring the trust is not self-executing and prior to the actual issuance of the trust patent there is no declaration of trust. Indeed it is clear that the mere approval of the schedule of allotments is not a declaration that the

United States will hold the title in trust for the benefit of the allottee, for the Secretary is not empowered to declare the trust or to issue patents for these lands. Under section 450 of the Revised Statutes the President is authorized to appoint a secretary whose duty it shall be, under the direction and guidance of the President, to sign in his name and for him, all patents for land granted under the authority of the United States. Congress provided the terms of the trust and left it to the President to declare the trust.

To overthrow this uniform ruling of the Department of the Interior and the contemporaneous interpretation put upon the statute by the President in issuing the trust patents, the Circuit Court of Appeals relies, first, upon the proposition that the right of the allottee in the lands became vested upon the approval of her allotment and that the issuance of a patent therefor was merely a ministerial act; and second, that whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so.

It is unimportant to determine when the right to an allotment becomes a vested right in land, since the extension or shortening of the trust period does not affect the vested right of the allottee. *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88. In this connection it might be well to note that under the proviso in section 5 of the act of 1887 the laws of descent and partition in the State or Territory where such lands are situated

apply to them only after patents therefor have been executed and delivered. This clearly evidences the intent of Congress that an inheritable estate in the lands (not necessarily in the right to an allotment) is not conferred merely by the approval of the allotment. The case of *United States* v. *Rowell*, 243 U. S. 464, is directly in point. In that case an act of Congress directed the Secretary of the Interior to issue a patent in fee to a designated member of an Indian tribe for a designated tract of land set apart as his allotment. It was insisted that this was a grant *in praesenti* and that therefore the Indian had a vested right in the land which could not be affected by a subsequent act of Congress for the repeal of the grant passed after the Indian had applied for a patent but before patent issued. The court held that the act was not a grant *in praesenti*, and that the Indian obtained no vested right in the land. In the *Rowell* case Congress had approved the allotment of the Indian and directed a patent to issue, while in this case the Secretary approved the allotment and the President issued the patent. However, as before said, the question of the duration of the trust period in no way affects any vested right of the Indian, and when the Indian's right vests is not here material.

The Circuit Court of Appeals points out various statutes under which Congress provided for the issuance of patents to Indians conveying the legal title to their allotments, with the provision that the land should be inalienable for a specific time from the

date of the issuance of patent, and from these statutes the court below concludes that whenever Congress desires the trust period to begin with the date of the patent it expressly says so. The statutes cited by the Circuit Court of Appeals, however, are not statutes relating to allotments to be held in trust for the Indians under trust patents, but relate solely to allotments where the legal title is conveyed by patent containing a restriction against alienation.

These statutes, therefore, do not justify the decision of the court, and there is no statute, so far as we are advised, providing for the issuance of trust patents, which declares that the trust shall run from the date of the patents.

There is no good reason why Congress should have made the trust period commence before the issuance of the instrument declaring it any more than there would have been for making restriction against alienation commence before patent issued, and in the absence of a contrary provision the clear inference is that the trust commenced with the date of the instrument declaring it.

CONCLUSION.

It is respectfully submitted that writ of certiorari should issue as prayed, and that the decree of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

JOHN W. DAVIS,
Solicitor General.

JULY, 1918.